SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5421

PHILIP WILLIAM MCKINNEY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PHILIP WILLIAM MCKINNEY,

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—v.—

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, PHILIP WILLIAM MCKINNEY, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 15, 1970.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Sixth Circuit is as yet unreported and is printed in the Appendix, *infra*, pp. 17-19. The oral opinion of the United States District Court, Eastern District of Kentucky, is printed in the Appendix, *infra*, pp. 20-31.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 15, 1970. Mr. Jus-

tice Stewart extended the time in which to file this petition for certiorari to and including August 14, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

Statutes and Regulations Involved

MILITARY SELECTIVE SERVICE ACT OF 1967 §6(J), 50 U.S.C. App. 456(J)

(J) Nothing contained in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or

neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix].

32 C.F.R. 1625.2

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Questions Presented

1. Whether the petitioner's claim of conscientious objection was timely and sufficient, and thus entitled him, as a matter of due process of law, to have that claim duly considered by the Selective Service System prior to his induction into the Armed Forces.

2. Whether the failure to provide petitioner with an opportunity to update his lapsed Form DD 98 invalidated his induction into the Armed Forces.

3. Whether the petitioner's Selective Service Board was required to reclassify him upon the Army's finding that he was "not presently acceptable for induction."

Statement of the Case

Philip William McKinney was first ordered to report for induction into the Armed Forces on June 7, 1967. He had been reclassified from 2-S to 1-A in October of the previous year, as a consequence of having terminated his college studies. He reported as ordered to the Induction Center (more technically, the Armed Forces Examination and Entrance Station) in Ashland, Kentucky. There he was given a medical examination and directed to fill out various forms. As a result of his responses on the Armed Forces Security Questionnaire (DD Form 98), he was ordered to remain overnight at the Induction Center for further processing (Tr. 111, 167).*

* References are to the transcript of testimony and proceedings which is contained in the Record filed with the Clerk of the Court.

It was upon his arrival at the Induction Center that the full implications of entering the Armed Forces in a combatant position were realized by petitioner, and that his feelings of conscientious objection crystallized. As petitioner testified, he was at a loss as to what he should do about his newly-resolved convictions until the subject came up in an interview the next day (Tr. 174).

This interview took place at the Induction Center on June 8 and was conducted by an Army Intelligence Officer. The contents of the interview were reduced to writing, sworn to, and signed by petitioner. It was witnessed by a second Army officer (Tr. 112, 113).

In the course of the interview, the following colloquy occurred:

> "Q. Are you willing to serve in the Armed Forces of the United States? A. At the present time I would not be adverse to serving in a non-combatant position in the military.
>
> Q. Do you consider yourself a conscientious objector? A. At the present time, yes" (Tr. 114).

At the interview's close, petitioner was told that an Army investigation would follow, and that he would be informed of its outcome (Tr. 169). At that point, he was allowed to return to his home. His Selective Service Registration Card, and Notice of Classification Card, both of which had been taken from him at the Center, were not then, and to this day have not been, returned (Tr. 175).

Petitioner was not advised to pursue his claim of conscientious objection with his Selective Service Board, or in any way given to understand that further action was

necessary to perfect that claim. Nor was the fact that petitioner desired to claim exemption from combatant service on conscientious objector grounds communicated by the Induction Center to his Selective Service Board (Tr. 169).

A week after he returned home, McKinney received a copy of Form DD 62 bearing only the notation "acceptability for induction held in abeyance, not presently acceptable for induction." The form was executed at the Induction Center by an Army officer and was directed to the petitioner's local board, which in turn forwarded a copy to him. Petitioner believed the form to have come directly from the Center (Tr. 77, 116).

Petitioner's records, which had been sent from the local board to the Center, were not immediately returned.

For the next nine months, during which time, presumably, the Army was conducting its investigation, there was a rather remarkable hiatus in the relationship between petitioner McKinney and his draft board. Petitioner believed he had begun a process which would result in an evaluation of his conscientious objector claim; his belief was fortified by the knowledge that the Army was investigating the content of his interview at the Induction Center, by the receipt of an Army form declaring him "presently unacceptable," and by the assumption that the official sequestration of his draft cards was an indication that his classification was being held in abeyance (Tr. 188, 189).

During these nine months, petitioner's local board did nothing to disabuse him of this view. In this period, no communication of any kind was sent the petitioner (Tr. 170). Six months elapsed before an inquiry as to the status

and records of the petitioner was made. That inquiry, from the Executive Secretary of the board to the Induction Center, was answered with the explanation that McKinney's acceptability was still in abeyance. His file at the board was placed in "suspense" (Tr. 68, 75). The Executive Secretary of the board testified that she understood all authority of the board to have terminated with the issuance of the original notice to report for induction (Tr. 78).

Board and registrant were released from this limbo on March 15, 1968, when the board received petitioner's records and a second Form DD 62 which declared petitioner acceptable for induction. The local board then acted in a fashion which demonstrated its own confusion and compounded that of the petitioner. On April 10, 1968, the Board sent Mr. McKinney a Current Information Questionnaire (SSS 127) (Tr. 67). Two days later, before any response to the form was possible, the Board sent him a notice to report for induction on May 15, 1968 (Tr. 65).

Petitioner reported as ordered to the induction center. He was not asked to complete a new Form DD 98 or to update or his first one (Tr. 174). He was, however, held over at the Center pending completion of a medical examination.

On May 17, 1968, petitioner was asked to step forward for induction and refused to do so. On September 17, 1968, he was indicted for refusing to submit to induction into the Armed Forces.

Philip McKinney was tried on March 24, 1969 in the United States District Court for the Eastern District of Kentucky before the Honorable Bernard T. Moynahan, United States District Judge, sitting without a jury. He

was found guilty and sentenced to five years in prison. The Court of Appeals for the Sixth Circuit affirmed the judgment, but remanded the case to the District Court for reconsideration of the sentence. Petitioner is presently free on bail.

REASONS FOR GRANTING THE WRIT

I.

There is a conflict among the Circuits as to the appropriate place, time and manner of registering claims of conscientious objection; petitioner's conviction is predicated upon a view which is inconsistent with this Court's admonitions of fair dealing with registrants.

In the United States Court of Appeals for the Second Circuit, petitioner's claim for exemption as a conscientious objector would have been accepted as both timely and sufficient; in the Ninth Circuit it may well not have been so accepted; in the Sixth Circuit it was not. The problem of timeliness—whether an objector whose views "crystallize" after he receives his notice to report for induction can claim exemption at that time—is presently before this Court in *Ehlert* v. *United States,* No. 1383, *cert. granted,* 25 L. Ed. 2d 808. Resolution of petitioner's case involves additional inquiry into the important correlative question of the requisites for a sufficient claim of exemption. The somewhat bizarre sequence of events which culminated in petitioner's refusal to submit to induction also serves to present the question of timeliness in a sufficiently altered form so as to require independent consideration.

Petitioner's transcribed and sworn statement that he was a conscientious objector was rejected by the District Court,

apparently because: (1) it came too late; (2) it was made at the Induction Center, and not lodged with his local board; and (3) it was in response to a question, rather than a spontaneous submission or application (see transcript of the Court's ruling from the bench, Appendix at pp. 17-19).*

The distinctions thus drawn by the District Court hardly seem consistent with the spirit of this Court's admonition that "[R]egistrants are not to be treated as though they were engaged in formal litigation assisted by counsel." *Simmons* v. *United States,* 348 U.S. 397, 404 n. 5 (1955). Indeed, in express conformity with that spirit, the Court of Appeals for the Second Circuit has repudiated each of the District Court's grounds for invalidating petitioner's claim for exemption. That court has held that a registrant's classification must be reopened for evaluation of a conscientious objector claim, even after the issuance of an induction order, if his views were thereby crystallized. *United States* v. *Gearey,* 368 F.2d 144 (2d Cir. 1966), *cert. denied,* 389 U.S. 959 (1967). Further, in *United States* v. *Stafford,* 389 F.2d 215, 218 (2d Cir. 1968), the Induction Center was held to be an appropriate place for making a claim for exemption, on the grounds that "a legally untutored registrant should [not] be penalized for his failure to distinguish between" the Selective Service System and the Army itself. And finally, even an oral statement of conscientious objection made to an officer at the Induction Center has been held to be an adequate means of initiating the process due a registrant who claims exemption on this ground. *United States* v. *Holmes,* —— F.2d ——, 2 S.S.L.R. 3489 (2d Cir. 1970).

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* Local Board Memorandum No. 41 (amended 1958) requires the local board to process any registrant who "has filed a written statement claiming he is a conscientious objector."

In contrast, the Court of Appeals for the Ninth Circuit has assumed a highly restrictive posture concerning the time, place and manner of conscientious objector claims. In *Ehlert* v. *United States, supra,* post induction-order claims, whether the product of "crystallization" or not, were held to be untimely under Selective Service Regulation, 32 C.F.R. §1625.2. Moreover, the lodging of a claim with an Army officer immediately prior to induction has been held to be ineffectual on the additional grounds that such an officer is not an agent of the Selective Service System, *Blades* v. *United States,* 407 F.2d 1397 (9th Cir. 1969).

The decision of the Sixth Circuit Court of Appeals in the case at bar represents a view of the relationship between a young citizen and the machinery of the draft which is the very antithesis of that evolved in the decisions of the Second Circuit Court of Appeals. Somewhat ironically, the Court below based its decision on precisely the elements of delay and confusion which so prejudiced the petitioner in asserting his claim of conscientious objection:

> McKinney had full opportunity to inform his Board of his conscientious objection beliefs if he had them and desired to make such a claim. On April 10, 1968, Current Information Questionnaire Form SSS127 was mailed by the Board to McKinney. He claims that he filled out the form but never returned it to the Local Board. In this form McKinney could have advised the Board of his claim of conscientious objection, if he desired to assert it, but he kept the form in his possession and never returned it to the Board in compliance with the instructions on the form. On the questionnaire it was stated: "You may attach any additional information you believe should be brought to the atten-

> tion of the local board." If McKinney desired to inform the only proper authority, namely, the Local Board, of his claim to conscientious objection, he could have done so by statement attached to this questionnaire.
>
> In the nine months' period between the first and second orders to report for induction, McKinney had ample time to make a claim to his Local Board for deferment on the basis of conscientious objection. App., *infra*, p. 27.

This position places the full responsibility for sorting out the administrative tangle which the acts and omissions of the Local Board and the officers at the Induction Center had created on the shoulders of the "untutored registrant."

The Courts of Appeals for the Second, Sixth, and Ninth Circuits have thus markedly diverged in the process of striking a balance "between the demands of an effective System for mobilizing the Nation's manpower in times of crisis and the demands of fairness towards the individual registrant." *Simmons* v. *United States*, 348 U.S. 397, 403 (1955). The need for resolving the conflict—which the Court of Appeals for the Sixth Circuit has joined with its decision in the instant case—is made all the more compelling because of the special importance of the privilege of conscientious objection. Fraught with constitutional overtones, and constructed in recognition of beliefs which are often held with great personal intensity, the conscientious objector provisions of the Selective Service legislation are necessarily the objects of considerable judicial solicitude.

The decision of this Court in *Ehlert* v. *United States, supra*, will not negate the importance of the instant case. Should the Court decide the *Ehlert* case in favor of the registrant-petitioner, the case at bar will provide an opportunity to resolve the sufficiency questions which follow once timeliness is assumed.

Should this Court rule against the registrant-petitioner in *Ehlert*, the claim of petitioner McKinney will by no means have lost its vitality, since the peculiar events surrounding his induction present a very different aspect of the timeliness issue than the more typical context presented by *Ehlert*. Petitioner made his claim as a conscientious objector eleven months before his refusal to submit to induction, and fully ten months before his Board sent him the second Notice to Report for Induction. During that period, the Army was conducting what presumably was an exhaustive investigation of him, and his ultimate availability for military service was in doubt. Any possible considerations of dispatch and certainty in the induction of men into the Armed Forces are inapplicable to petitioner's case, where the Army itself rendered those goals unattainable. Processing of the petitioner's claim could not have added to the delay and uncertainty which already attended his induction.

This is not to suggest that petitioner's cause is entirely distinct from the issues which confront this Court in *Ehlert*. On the contrary, the case at bar and the *Ehlert* case together provide the occasion for a comprehensive consideration of the rights of the Selective Service registrant whose conscientious objections to war mature only after receipt of the order to report for induction. This Court may well wish to hear and decide the case at bar in consolidation with *Ehlert* v. *United States*.

II.

The decision of the Court below is in conflict with the holding of the Ninth Circuit Court of Appeals that a failure to provide a pre-induction registrant with an opportunity to complete Form DD 98 invalidates his induction into the armed forces; the Ninth Circuit rule is more consistent with this Court's admonitions of fair dealing with registrants.

When petitioner was ordered to report for induction in May of 1968, eleven months had elapsed since his completion of Form DD 98. That form was therefore no longer valid. AR 601-270, par. 80a(8). Under the applicable regulation, he was required to be given the opportunity to certify that his original DD 98 form was still full, true and correct. Failing such certification, original security processing, including the execution of a new DD 98, should have been undertaken, *id.* This regulation was in no way complied with, and the petitioner was thus deprived of the opportunity to modify his representations on the lapsed DD 98 form.

In the Ninth Circuit, failure to afford a pre-induction registrant the opportunity to complete Form DD 98 has been held to invalidate his induction, *Oshatz* v. *United States,* 404 F.2d 9 (9th Cir. 1968). The reasoning of the Ninth Circuit Court of Appeals is as simple as it is compelling: completion of the Security Questionnaire could result in disqualification from military service and nullify a refusal to submit for induction; failure to provide an opportunity to complete the form may thus be the *sin qua non* of a registrant's felony conviction and is highly prejudicial, 404 F.2d at 12.

The situation of the petitioner, whose DD 98 form was lapsed, is virtually identical to that of the registrant who never completed a form. McKinney might well have changed his affiliations or views sufficiently to have suffered disqualification from the draft on military grounds. Here again, the Sixth Circuit Court of Appeals has diverged from the rulings of another Court of Appeals, and here again it has diverged from the spirit of fairness to the registrant formally articulated in *Simmons* v. *United States,* 348 U.S. 397, 403 (1955).

III.

The failure of petitioner's Local Board to reclassify him during the nine month pendency of his pre-induction raises important questions of due process not previously addressed by this Court.

The focus of due process concern in the Selective Service process has centered upon the classification process. The traditional elements of notice and an opportunity to be heard come into play only when the board undertakes classification or reclassification. Thus, when petitioner's board chose to respond to the lengthy hiatus in his induction processing by merely placing his file in "suspense," serious questions of due process arose. The avoidance of classification became the avoidance of any notice or hearing and was a primary source of the petitioner's confusion. Moreover, there is no provision in the applicable regulations for placing a registrant's file in suspense, and those regulations would seem to have required reclassification under the petitioner's circumstances. See 32 C.F.R. §§1622.17, 1632.30.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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August 14, 1970

APPENDIX

Opinion of the United States District Court, Eastern District of Kentucky

The Court: All right, Gentlemen. I have heard the evidence in this case and it appears to be undisputed that this defendant was required to register under the Selective Service Act, that he did register and was classified. An examination of the file discloses that (224) there was a basis in fact for the classification, both that of 2-S originally and then the classification of 1-A, which was made on October 18, 1966. It appears to be undisputed that the defendant never appealed that classification and that he did not exhaust his administrative remedies.

It appears further to be undisputed that he never asked for conscientious objector status. In connection with some statement that he made relative to an answer to the DD Form 98, he was interrogated by an officer of the United States Intelligence Service and in the course of that interrogation the officer asked him this question right at the end of the interrogation:

> "Q. Are you willing to serve in the Armed Forces of the United States? A. At the present time I would not be adverse to serving in a noncombat position in the military.
>
> Q. Do you consider yourself a conscientious objector? A. At the present time, yes."

It appears to the Court that an effort is made here to commingle this inquiry as to the defendant's alleged subversive activities with a claim made that at that time he asserted he was a conscientious objector. (225) But even if he had asked for conscientious objector status, it came

too late, when it was first made at the time of his induction. I think the Jennison case clearly answers that—a case that was tried here in this court.

This defendant just made his own terms. He refused to take the step forward. And in the opinion of the Court this is the result of his hindsight. In examining all of these records they find in this one statement made to this Intelligence Officer for the first time that he considered himself a consicentious objector. He did not make the statement. The officer asked him and in response to the inquiry he made that statement. But he just sat around and sat around and let time go by. He registered in November, 1965, three years and four months ago. He was classified as 1-A in October of 1966, two years and five months ago. He never presented this claim to the draft board. The draft board had no way of knowing about it, if it was a claim. And he didn't assert a claim; he answered that question "At the present time, yes."

The Court finds that this defendant did not exhaust his administrative remedies. He is precluded from now raising it under the McKart case. If he had asked for conscientious objector status at that time, it came too late, in the light of the opinion in the Jennison (226) case. I don't know why this officer of the Intelligence Service made this inquiry. I don't think it was relevant to the issue as to whether or not this defendant was a conscientious objector. But the fact remains that the Army delayed for some time before they determined that this man was acceptable. But during all of that time he had an opportunity to go back to the draft board, and he didn't do it.

It would just be a clear perversion of the provisions of the law to allow a defendant to do this. Suppose every

defendant that was called to serve in the military service, or every registrant called to serve in the military service never made any claim to conscientious objector status, did not appeal a 1-A classification, didn't do anything, and when he got down to the induction center he told somebody down there—suppose he volunteered and told somebody "I think I'm a conscientious objector," then do you have to go back and go all through the procedure again? This is exactly what the Jennison case says you don't have to do, and this is exactly what the McKart case says you are precluded from doing where you haven't exhausted your administrative remedies.

The Court finds the defendant guilty of the charge contained in the indictment.

Opinion of the United States Court of Appeals—Sixth Circuit

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19649

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— v. —

PHILIP WILLIAM MCKINNEY,

Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY.

Decided and Filed June 15, 1970.

Before PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

WEICK, Circuit Judge. Appellant, Philip William McKinney, was convicted by the District Judge, sitting without a jury, for knowingly refusing to submit to induction into the Armed Forces, and was sentenced to five years' imprisonment. 50 U.S.C. App. § 462(a). He appeals from the judgment of conviction. We affirm.

McKinney became 18 years of age on October 19, 1965, at which time he registered for the draft. He was then a first-year student at Ohio Wesleyan University in Delaware, Ohio. His Local Board, No. 106, in Portsmouth, Ohio, classified him 2-S (student deferment).

McKinney completed and returned to the Local Board on October 4, 1966 a current information questionnaire which had been sent to him so the Board could determine whether he was properly classified. In the questionnaire he indicated that he was no longer a student. As a result of this information, his Local Board reclassified him 1-A (available for induction). He did not appeal from this classification.

On October 25, 1966, McKinney was ordered to report for a physical examination on November 29; he complied with this order. In December, 1966, his Local Board received a Certificate of Acceptability (Form DD62), indicating that from a physical standpoint McKinney was acceptable for military service, and the Local Board forwarded a copy of the certificate to him.

On May 11, 1967, McKinney was sent another current information questionnaire. On the face of the questionnaire there was stated: "The law requires you to fill out and return this questionnaire on or before the date shown to the right above [May 21, 1967] in order that your local board will have current information to enable it to classify you." He never returned the questionnaire to the Board.[1] On May 15 he received a notice to report for induction at the Induction Center in Ashland, Kentucky, on June 7.

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[1] McKinney testified that he completed the current information questionnaire and took it with him to the Induction Center, but that no one there asked for it. Since his instructions were to re-

McKinney testified that he was pretty much resigned to serving in the Army, and he reported for induction as ordered. At the Induction Center he surrendered his Selective Service Registration Card and his Notice of Classification Card. He underwent a pre-induction physical examination at that time, and was found physically acceptable for military service. He was also given an Armed Forces Security questionnaire to complete (form DD98), and was then directed to remain over night at the Induction Center.

McKinney testified that during his stay at the Induction Center, his feelings of conscientious objection crystallized. On the second day of his stay at the Center, McKinney was interviewed for security clearance by an Army Intelligence Officer, and was questioned concerning some answers given the previous day in the Armed Forces Security questionnaire. The interview was conducted under oath and was reduced to writing. McKinney was questioned concerning his membership, affiliation and activities with organizations and groups on the Attorney General's list. At the close of the interview the following questions were asked and answers given:

> "Q. Are you willing to serve in the Armed Forces of the United States? A. At the present time I would not be adverse to serving in a non-combat position in the military.
>
> Q. Do you consider yourself a conscientious objector? A. At the present time, yes."

---

turn the completed questionnaire to his Local Board as he had done with a prior questionnaire, he would not have good reason to expect that any one at the Induction Center might ask him for it.

It will be noted that McKinney did not volunteer the information to the Security Officer concerning his beliefs or conscientious objection; his response was only to a question put to him by the officer. As a result of this security interview, McKinney was told that an investigation would be conducted and that he would be informed of the results.[2] McKinney was then sent home without his draft card, which was retained at the Induction Center.

On June 15, the Induction Center sent a certification of acceptability (Form DD62) to McKinney's Local Board, which form in relevant parts recited:

> "THE QUALIFICATIONS OF THE ABOVE-NAMED REGISTRANT HAVE BEEN CONSIDERED IN ACCORDANCE WITH THE CURRENT REGULATIONS GOVERNING ACCEPTANCE OF SELECTIVE SERVICE REGISTRANTS AND HE WAS THIS DATE:
>
> ☐ 1. Found fully acceptable for induction into the Armed Forces.
>
> ☐ 2. Found not acceptable for induction under current standards.
>
> ---
>
> REMARKS (These to be directed to Local Board only)
>
> Acceptability for induction held in abeyance, not presently acceptable for induction."

Form DD62, sent to the Local Board, was the correct method to be used to notify it that the registrant had given

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[2] The investigation was for security purposes and had nothing to do with respect to his alleged conscientious objection beliefs.

information requiring further investigation, and that a final determination of his acceptability at the Induction Center could not be made until after completion of the investigation. His acceptability was held in abeyance. Army Regulations in effect at the time provide:

> "DD Form 62 prepared for registrants referred to in (2) above will contain in remarks section the notation 'Acceptability for induction held in abeyance, not presently acceptable for induction.' No other notations will be made on the DD Form 62 and no other information or papers will be released to Selective Service local boards. Entries in regard to acceptability for induction will not be made." Army Regulation 601-270 § 80(b)(5) (Aug. 1965).

Thus, correct procedures were followed in all respects in this case. A copy of DD Form 62 was forwarded to McKinney by the Local Board. His records were not returned to the Local Board, nor was the Board informed of McKinney's answer to the question put to him by the Army Intelligence Officer at the Induction Center to the effect that he considered himself at that time a conscientious objector. Nor did McKinney have any further contact with his Local Board.

After six months, on January 2, 1968, the Executive Secretary of the Local Board wrote to the Induction Center inquiring about the status of McKinney's case. The Induction Center responded:

> "Subject registrant's acceptability is still being held in obeyance [sic] due to a qualified 98. Follow up action will be taken so that a final determination can be made."

On March 15, 1968, the Induction Center sent another form DD62 to the Local Board. This time the space had been checked which provided:

> "1. Found fully acceptable for induction into the Armed Forces."

McKinney's records were returned to the Local Board on the same date. McKinney received a copy of Form DD62 from the Local Board.

On April 10, the Local Board sent to McKinney another current information questionnaire with instructions to complete and return it to the Board within ten days. McKinney never returned the questionnaire to the Board.[3]

On April 12, McKinney was sent an order to report for induction on May 15, and he reported to the Induction Center as ordered. He was given another physical examination and was held over until May 17 while results of the examination were checked. He was not asked to complete another Armed Forces Security questionnaire. On May 17 the induction ceremony was held, and McKinney refused to take the ceremonial step forward. He was advised of the consequences of his refusal, but he persisted. He indicated that his refusal was based on his conscientious objection.

Several questions are raised by McKinney in his appeal. He contends: First, that he "was denied due process in that the Local Board never considered his claim of conscientious objection"; Second, that he was denied due process of law because the Local Board did not reclassify him after re-

[3] McKinney did not take this questionnaire to the Induction Center, according to his testimony, because no one had asked for it the first time he was at the Induction Center. Instructions on the questionnaire are clear that it was to be returned to the Local Board. He should have known where to return Local Board questionnaires because of his previous experience with them.

ceipt of the certificate of acceptability from the Induction Center, reciting that he was "not presently acceptable for induction"; and Third, that he was denied due process of law by reason of the failure to provide him with a second DD98 security form at the Induction Center in May, 1968.

Relative to McKinney's due process argument that the Board did not consider his conscientious objector claim, it is significant that he never made any such claim to the Board. It had no knowledge of such a claim and was never afforded an opportunity to consider it. He never asked the Board for SSS Form 150, which is the special form for that purpose required by the regulations to be filled out and submitted to the Board for its consideration. The form is specified in Series VIII on page 4 of his Classification Questionnaire.

McKinney relies solely on his answer to the question put to him by the Security Officer at the Induction Center to support his contention that he made a claim for deferment as a conscientious objector. The Board was never informed of this conversation at the Induction Center.

The District Judge was of the view that this colloquy did not constitute a claim for deferment on the basis of conscientious objection, and that if it did, such claim was not made to the proper authority.

The District Judge, in his opinion, stated:

> "It appears to the Court that an effort is made here to commingle this inquiry as to the defendant's alleged subversive activities with a claim made at that time he asserted he was a conscientious objector.
>
> ". . . And in the opinion of the Court this is the result of his hindsight. In examining all of these records they find in this one statement made to this In-

telligence Officer for the first time that he considered himself a conscientious objector. He did not make the statement. The officer asked him and in response to the inquiry he made that statement . . . He never presented this claim to the draft board. The draft board had no way of knowing about it, if it was a claim. And he didn't assert a claim; he answered that question 'At the present time, yes.'"

McKinney had full opportunity to inform his Board of his conscientious objection beliefs if he had them and desired to make such a claim. On April 10, 1968, Current Information Questionnaire Form SSS127 was mailed by the Board to McKinney. He claims that he filled out the form but never returned it to the Local Board. In this form McKinney could have advised the Board of his claim of conscientious objection, if he desired to assert it, but he kept the form in his possession and never returned it to the Board in compliance with the instructions on the form. On the questionnaire it was stated: "You may attach any additional information you believe should be brought to the attention of the local board." If McKinney desired to inform the only proper authority, namely, the Local Board, of his claim to conscientious objection, he could have done so by statement attached to this questionnaire.

In the nine months' period between the first and second orders to report for induction, McKinney had ample time to make a claim to his Local Board for deferment on the basis of conscientious objection.

Regulation 1625.1(b) requires a registrant to report to the Board within ten days after it occurs, any fact which might result in his being placed in a different classification. If, as he claims, McKinney's beliefs on conscientious objec-

tion "crystallized" on June 8, 1967, when he reported for induction the first time, he did nothing to notify his Board thereof during the nine months' period which elapsed before he received his second order to report for induction.

We are not here dealing with an uneducated illiterate. McKinney was a high school graduate with one year of college. If he had any question about his rights, obligations or duties, he had ample opportunity to consult with his Local Board or with others, for advice.

We think there was substantial evidence to support the finding of the District Judge that McKinney never at any time asserted a claim for deferment on the basis of conscientious objection.

The Government contends that a conscientious objector claim, made for the first time after receipt of an order to report for induction, is too late. We find it unnecessary to determine this question because of our affirmance of the conviction on other grounds. The question of timeliness of the claim, however, is now before the Supreme Court for decision in *Ehlert* v. *United States,* No. 1383, *cert. granted,* 38 U.S.L. Week 3432.

McKinney contends that he was denied due process of law because the Local Board did not reclassify him after receipt from the Induction Center of the DD62 certificate of acceptability reciting that he was "not presently acceptable for induction."

McKinney urges that the Local Board should have reclassified him I-Y when it received form DD62 on June 15, and that its failure to do so was a procedural error which substantially prejudiced him. As previously shown, form DD62 certificate of acceptability is used by the Army to

notify a Local Board whether a registrant has been found acceptable for induction into the Armed Forces.

McKinney argues that when a Local Board receives a form DD62 reciting that the registrant is "not presently acceptable for induction," it is required by 32 C.F.R. § 1632.30 to reopen his classification and reclassify him. In our view, no such procedure is required. Under 32 C.F.R. §§ 1625.11-.13, a reopening requires that the registrant be notified of the reclassification (even if his classification is not changed), and that he be given opportunity to appeal.

McKinney contends that had this procedure been followed in the present case, his classification would have been reopened when the Local Board received the DD62, and that he should have been reclassified I-Y.[4] After his reclassification he would have been entitled to notice and an appeal. Similarly, he contends that when the Local Board received the second DD62 on March 15, 1968, indicating that he was fully acceptable, the Board again was required to reclassify him, with the consequent right to notice and appeal. He contends that failure of the Local Board to reclassify him, therefore, denied him two appeals, and caused substantial prejudice.

McKinney's argument is premised on a misunderstanding of the applicable regulations.

32 C.F.R. § 1632.30 provides:

> "Upon receiving *notice* from the induction station that a selected man who has been forwarded for in-

[4] 32 C.F.R. § 1622.17 provides for a I-Y classification for those found "not currently qualified for service . . . ." It is irrelevant what classification McKinney would have been entitled to, since he would have been entitled to notice and appeal after reopening, even if his classification had not been changed. 32 C.F.R. §§ 1632.30 and 1625.11-.13.

> duction *has been inducted* or *finally found not qualified* for service in the Armed Forces, it shall reopen his classification and classify him anew." (Emphasis added)

At the outset, the operation of the regulation is dependent upon receipt of "notice," not on receipt of a DD62 certificate of acceptability. The Army has chosen for its own convenience to send the DD62 as "notice".

Under the regulation the Local Board was required to reopen the classification in only two situations: (1) when the Local Board has been notified that registrant has been actually inducted; or (2) when the Local Board has been notified that registrant has been finally found not qualified. Neither of these two situations existed. The DD62 form sent to the Local Board did not state that McKinney was finally found unacceptable. If the Induction Center had desired to indicate that he was finally found unacceptable, it would have checked off box "2: Found not acceptable for induction under current standards." What the Induction Center actually did was to leave both boxes blank, and to insert the remark: "Acceptability for induction held in abeyance, not presently acceptable for induction." As we have previously shown, this complied with the applicable regulation.

Finally, McKinney contends that he was denied due process of law because he was not provided with a new DD98 security questionnaire to complete at the Induction Center in May, 1968.

Even if it were assumed that the Induction Center was under an obligation to provide to McKinney a second DD98 security questionnaire, we can find no prejudice in its fail-

ure to do so. The purpose of the DD98 form is to protect the Armed Forces from persons who, by reason of their affiliations, are not acceptable for service in the Armed Forces. Its purpose is not to protect the registrant. See *Welsh* v. *United States,* 404 F.2d 1078, 1085 (9th Cir. 1968), *cert. granted,* 396 U.S. 816 (1969); but see *Oshatz* v. *United States,* 404 F.2d 9, 12 (9th Cir. 1968).

An additional reason for finding no denial of due process is the fact that McKinney did not allege any facts which were not included on the original DD98 form and which would have brought about a second security investigation. There was, therefore, no prejudice in the failure to furnish to him a second DD98 form.

We are concerned with the propriety of imposition of the five years' prison sentence in this case. There was sufficient evidence in this case from which the trier of fact could find that McKinney knowingly refused to submit to induction; however, the record shows that McKinney at all time was willing to serve his country in a noncombatant capacity. The record discloses no prior criminal record. Under these circumstances, we are of the opinion that the maximum sentence was excessive and out of proportion to the offense. *Weems* v. *United States,* 217 U.S. 349 (1910); *cf. United States* v. *United Mine Workers,* 330 U.S. 258, 304-307 (1947); *Smith* v. *United States,* 273 F.2d 462, 468 (10th Cir. 1959) (dissenting opinion by Murrah, Chief Judge), *cert. denied,* 363 U.S. 846 (1960); *State of Ohio* v. *Hashmall,* 160 Ohio St. 565, *cert. denied,* 348 U.S. 842 (1954).

The District Judge will have opportunity to reconsider the sentence upon the remand for that purpose.

We affirm the conviction. We remand for reconsideration of the sentence, but we retain jurisdiction to consider the sentence finally imposed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19,649

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

PHILIP WILLIAM MCKINNEY,

Defendant-Appellant.

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed. The case is remanded for reconsideration of the sentence,

but this Court will retain jurisdiction to consider the sentence finally imposed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS
Clerk

A True Copy

Attest:

CARL W. REUSS
Clerk

Issued as Mandate:

COSTS: NONE

Filing fee ..... $ .....
Printing ..... $ .....

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